BELLSOUTH

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March 5, 2004

The Honorable Bruce Duke
Executive Director
Public Service Commission of SC
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, Inc. v. NewSouth Communications Corp.
Docket No.: _____

Dear Mr. Duke:

Enclosed for filing are an original and ten copies of BellSouth Telecommunications Inc.'s Complaint and Request for Summary Disposition Against NewSouth Communications Corp. in the above-referenced matter.

By copy of this letter I am serving all parties of record with a copy of this Complaint as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosures
cc: All Parties of Record
PC Docs #529922

BEFORE THE

PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

BellSouth Telecommunications, Inc.	)	
	)	
Petitioner,	)	
	)	
vs.	)	Docket No. _____
	)	
NewSouth Communications Corp.	)	
	)	
Defendant.	)	
	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S COMPLAINT AND REQUEST FOR SUMMARY DISPOSITION AGAINST NEWSOUTH COMMUNICATIONS CORP.

BellSouth Telecommunications, Inc. ("BellSouth") files this Complaint and Request for Summary Disposition against NewSouth Communications Corp. ("NewSouth") with the Public Service Commission of South Carolina ("Commission"). The purpose of this Complaint and Request is to enforce the audit provision in Attachment 2, Section 4.5.1.5 of BellSouth's Interconnection Agreement (the "Agreement") with NewSouth, which provides BellSouth the right to audit NewSouth's EELs.

SUMMARY

BellSouth is entitled to audit NewSouth's loop and transport combinations (EELs), whether new or converted at NewSouth's request from special access circuits to UNEs. Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003, afford NewSouth the right to order new EELs. Amendments to Agreement, Exh. A.

Section 4 of Attachment 2 of the Agreement affords NewSouth the right to seek conversion of special access circuits to EEL UNE combinations provided that NewSouth self-certifies that the circuits are used to provide a "significant amount of local exchange traffic." *See* Agreement, Att. 2, § 4.5 *Et seq*, Exh. A. Section 4.5.1.5 specifically affords BellSouth the right to audit NewSouth's loop and transport combinations to verify the amount of local exchange traffic on the circuit. *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. Section 4.5.1.5 provides as follows:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on the audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A. Pursuant to that provision, BellSouth is entitled to audit NewSouth's records to verify the type of traffic being placed over combinations of loop and transport network elements. *See id.* BellSouth has given NewSouth repeated notice of its intent to conduct such an audit, and to seek the appropriate relief as dictated by the results of such audit. *See Letter from Jerry Hendrix to Jake Jennings*, 4/26/02, Exh. B. NewSouth has failed and refused to allow such audit and therefore has breached its Agreement with BellSouth.

NewSouth has refused to allow such an audit, citing BellSouth's alleged non-compliance with the requirements for audits under the *Supplemental Order Clarification.*[1] Although

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[1] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

BellSouth has fully complied with the audit requirements of the *Supplemental Order Clarification*, BellSouth's right to audit NewSouth's records is governed by the terms of the voluntarily negotiated Agreement. 47 U.S.C. § 252(a)(1); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251"); *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...").

Attachment 2, Section 4.5.1.5 of the Agreement unequivocally allows BellSouth, upon 30 days' notice and at BellSouth's expense, to conduct an audit of NewSouth's records to verify that NewSouth is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Agreement, Att. 2, Sec.§ 4.5.1.5, Exh. A. The Agreement does not require that BellSouth meet *any* additional conditions.

To the extent NewSouth was interested in adding audit conditions from the Federal Communications Commission's ("FCC's") *Supplemental Order Clarification*, NewSouth could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated into the Parties' Agreement. NewSouth did just that with respect

to the separate audit provision in the Agreement for the so-called Option 4 conversions. Agreement, Att. 2, § 4.5.2.2, Exh. A ("[a]n audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order..."). However, with respect to audit rights for loop and transport combinations not falling under Option 4, the Parties did not incorporate the *Supplemental Order Clarification's* audit requirements, whether by reference or by including specific language from the *Order*. This omission was intentional, as other sections of the Parties' Agreement specifically mention the Order. *See e.g.*, Agreement, Att. 2, § 4.5.2.2, Exh. A. Section 4.5.1.5 is unambiguous in describing BellSouth's audit rights, and there is no valid theory under Georgia law (the governing law for the Agreement) by which the *Supplemental Order Clarification* can be both an express contract term (for Option 4 audit purposes) and an implied contract term (for EEL audit purposes) in the same section of a contract. *See e.g., Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 256 Ga. App. 58, 567 S.E.2d 697 (2002) ("Where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms"); *Sosebee v. McCrimmon*, 228 Ga. App. 705, 492 S.E.2d 584 (1997) ("Courts are not at liberty to revise contracts while professing to construe them").[2]

REQUEST FOR SUMMARY DISPOSITION

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[2] South Carolina law on this subject is substantially similar to the controlling Georgia law cited above. *See, e.g., B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.); *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 330, 19 S.E.2d 463, 466 (1942)("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

This case is perfectly suited for summary disposition by the Commission on a paper record without a hearing. The question before the Commission is a straightforward question of contract interpretation: the parties entered into a voluntarily negotiated Agreement; the Agreement provides BellSouth an unqualified right to audit NewSouth's EELs on 30 days notice and at BellSouth's expense; NewSouth has breached the Agreement by refusing to permit BellSouth to undertake the audit. Although BellSouth has discussed its compliance with the *Supplemental Order Clarification* in this Complaint in anticipation of NewSouth's response, the Commission does not need to conduct a hearing to rule in this matter, and thus this Complaint should be addressed efficiently and expeditiously on a paper record.

In support of its Complaint, BellSouth shows as follows:

PARTIES

1. BellSouth is a Georgia corporation with its principal place of business located at 675 W. Peachtree Street, N.E., Atlanta, Georgia, 30375. Padgett Affidavit, ¶ 1, Exh. C. BellSouth is a public utility presently providing comprehensive telecommunications services to its subscribers pursuant to intrastate tariffs approved by the Commission.

2. Defendant NewSouth is a Delaware corporation with its principal place of business at Two North Main Street, Greenville, South Carolina, 29601, (864) 672-5877. Padgett Affidavit ¶ 4, Exh. C.

3. NewSouth is a competitive local exchange carrier providing local and long distance voice and data services in South Carolina. Padgett Affidavit ¶ 5, Exh. C.

JURISDICTION

4. The Commission has jurisdiction over this matter under section 252 of the Act.

SUMMARY OF THE ACTION

5. BellSouth seeks a determination from this Commission that pursuant to the Parties' Agreement, BellSouth is entitled to audit any of NewSouth's EELs. Agreement, Att. 2, § 4.5.1.5, Exh. A; *Supplemental Order Clarification* ¶¶ 29-32.

NewSouth has consistently refused BellSouth's repeated requests to conduct a post-conversion audit for the purpose of determining the types of traffic traveling over NewSouth's EELs. *See Letter from Jake Jennings to Jerry Hendrix*, 5/3/02. Exh. D. NewSouth's refusal to allow BellSouth to conduct such audits violates the Parties' Agreement and leaves BellSouth without recourse to validate the self-certifications provided by NewSouth. Agreement, Att. 2, § 4.5.1.5, Exh. A; *Supplemental Order Clarification* ¶¶ 29-32. BellSouth on numerous occasions has notified NewSouth of BellSouth's intent to exercise its audit rights under the Agreement. Hendrix Affidavit ¶¶ 6 -14, Exh. E.

6. In each instance, NewSouth has declined and thereby breached the Agreement. Hendrix Affidavit ¶¶ 6-15, Exh. E.

FACTS

The Parties' Interconnection Agreement

7. On May 18, 2001, BellSouth and NewSouth entered into a voluntarily negotiated Interconnection Agreement ("Agreement") that covers South Carolina, as well as the other eight states in BellSouth's operating region. Agreement, GTC, § 2.1, Exh. A; *see* Padgett Affidavit ¶ 6, Exh. C. The Agreement specifically provides that NewSouth is entitled to have access to Enhanced Extended Links ("EELs"). Agreement, Att. 2, § 4 *et seq*, Exh. A. The Agreement provides:

> Where necessary to comply with an effective [FCC] and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 4.3 below [which describes the various types of EELs combinations].

Agreement, Att. 2, § 4.2, Exh. A. Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003 provide NewSouth access to new EELs. Amendments to Agreement, Exh. A. The Agreement also specifically addresses the conversion of special access circuits to EELs. Agreement, Att. 2, § 4.5 e*t seq*, Exh. A. Pursuant to the Agreement, "NewSouth may not convert special access services to combinations of loop and transport network elements ... unless NewSouth uses the combination to provide 'a significant amount of local exchange service' (as described in Section 4.5.2 below), in addition to exchange access service, to a particular customer." Agreement, Att. 2, § 4.5.1, Exh. A. The term "significant amount of local exchange service" is "as defined in the [FCC's] June 2, 2000 Order." Agreement, Att. 2, § 4.5.1.2, Exh. A. In particular, the Agreement incorporates by reference Paragraph 22 of the *Supplemental Order Clarification*, which provides three scenarios under which a CLEC may self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att. 2, § 4.5.1.2, Exh. A (citing *Supplemental Order Clarification* ¶ 22).

8. The Agreement provides that NewSouth must self-certify compliance with the "significant amount of local exchange service" criteria prior to converting a special access circuit to an EEL. Agreement, Att. 2, § 4.5.1.2, Exh. A.

9. In addition to the three self-certification options set forth in the *Supplemental Order Clarification* and incorporated into the Agreement by reference, the Agreement states that "[i]n addition to the circumstances under which NewSouth may identify special access circuits that qualify for conversions to EELs (referenced in Section 4.5.1.2 above), NewSouth also shall be

entitled to convert special access circuits to unbundled network elements pursuant to the terms of this section 4.5.2 *et seq*." Agreement, Att. 2, § 4.5.2, Exh. A.

10. More specifically, the Agreement states that NewSouth could "convert special access circuits to combinations of an unbundled loop connected to special access transport provided that: (1) the combination terminates to a NewSouth collocation arrangement; and (2) NewSouth certifies, in the manner set forth in Section 4.5.2 above, that at least 75% of the unbundled network element(s) component of the facility is used to provide originating and terminating local voice traffic." Agreement, Att. 2, § 4.5.2.1, Exh. A. Conversions under this option are referred to as "Option 4 conversions."

11. Under Sections 4.5.2 and 4.5.2.1, therefore, NewSouth had a total of four conversion options in the Agreement, and therefore four scenarios under which it could self-certify to the transmission of a "significant amount of local exchange service" over the affected circuits. Agreement, Att. 2, § 4.5.1.2, § 4.5.2.1, Exh. A. With respect to Option 4 conversions, the Agreement states "that the conversion option described in Section 4.5.2 . . . constitute[s] a reasonable negotiated alternative to those developed by the [FCC] in [its] June 2, 2000 Order." Agreement, Att. 2, § 4.5.5, Exh. A.

12. The Agreement provides BellSouth audit rights with respect to new EELs and circuits converted under each of the four conversion options. Agreement, Att. 2, § 4.5.1.5; § 4.5.2.2, Exh. A. With respect to EELs, the Agreement provides BellSouth an unqualified right to audit at BellSouth's expense and upon thirty (30) days notice to NewSouth. Agreement, Att. 2, § 4.5.1.5, Exh. A. Specifically, with regard to loop and transport combinations, the Agreement provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve

> month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000, Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements. If, based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate [State] Commission, pursuant to the dispute resolution process set forth in the Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A.

13. With respect to combinations of unbundled loops and special access transport under "Option 4," the Agreement provides:

> Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

Agreement, Att. 2, § 4.5.2.2, Exh. A. Notably, while BellSouth's audit rights with respect to Option 4 conversions are explicitly qualified by the criteria set forth in the *Supplemental Order Clarification*, *see* Agreement, Att. 2, § 4.5.2.2, Exh. A, BellSouth's audit right with respect to loop and transport combinations is absolute - there are no qualifications on BellSouth's right to audit, whether set forth in the *Supplemental Order Clarification* or elsewhere, other than that BellSouth provide 30 days notice and that BellSouth incur the cost of the audit. Agreement, Att. 2, § 4.5.1.5, Exh. A.

The *Supplemental Order Clarification*

14. On June 2, 2000, the FCC issued its *Supplemental Order Clarification*, addressing three issues arising out of the *Supplemental Order*,[3] which had addressed the "ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*." *Supplemental Order Clarification* ¶ 1.

15. In the *Supplemental Order Clarification*, the FCC specifically held that while CLECs have the right to self-certify compliance with the requirement that they are providing significant amounts of local exchange service over EEL combinations, ILECs have the right to conduct audits of those circuits after conversion. *Supplemental Order Clarification* ¶ 1.

16. In paragraph 29 of the *Supplemental Order Clarification*, the FCC held that "[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent necessary to determine a requesting carrier's compliance with the local usage options." *Supplemental Order Clarification* ¶ 29. The FCC went on to hold that although it stated in the original Supplemental Order that it did "not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport elements was so limited in duration," it recognized the necessity of the audits in the *Supplemental Order Clarification* when it extended the temporary constraint. *Supplemental Order Clarification* ¶ 29.

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, Commission 99-370 (rel. Nov. 24, 1999).

17. While the FCC noted in a footnote that audits should not be "routine,"[4] it also held, in recognition that audits would occur, "that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." *Supplemental Order Clarification* ¶ 32, n.86.

18. Finally, and importantly, the FCC specifically noted the existence of audit rights in interconnection agreements, and held that "[w]e do not believe that we should restrict parties from relying on these agreements." *Supplemental Order Clarification* ¶ 32.

NewSouth's Loop and Transport Combinations

19. Pursuant to Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003, NewSouth is entitled to order new loop and transport combinations. NewSouth has ordered approximately 1700 new EELs pursuant to the Parties' Agreement. Padgett Affidavit, ¶ 7, Exh. C.

20. In the late summer 2001, pursuant to the conversion process set forth in the Agreement, NewSouth began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. Padgett Affidavit ¶ 7, Exh. C. According to the procedures agreed to by the parties, the e-mails were to attach one or more spreadsheets, using a particular format. Padgett Affidavit ¶ 7, Exh. C. The spreadsheets were to identify the circuits to be converted and which of the four safe harbor options applied to that circuit. Padgett Affidavit ¶ 7, Exh. C. Since 2001, NewSouth has requested conversion of thousands of circuits from special access services to UNEs. Padgett Affidavit ¶ 7, Exh. C.

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[4] As explained in Paragraph 27 below, BellSouth does not conduct routine audits.

21. Pursuant to the terms of the Agreement, BellSouth processed both orders for new EELs and the conversions from special access circuits to UNEs based on NewSouth's self-certifications. Padgett Affidavit ¶ 8, Exh. C. At no time did BellSouth demand or request an audit of any NewSouth circuits prior to the provisioning of those circuits. Padgett Affidavit ¶ 8, Exh. C. With respect to the Option 4 conversions, BellSouth did not invoke its right to audit the circuits prior to conversion in a good-faith effort to process the conversions as expeditiously as possible. Padgett Affidavit ¶ 8, Exh. C.

BellSouth's Requests for An Audit and NewSouth's Refusal

22. On April 26, 2002, in accordance with the terms of the Agreement, BellSouth sent NewSouth a letter notifying NewSouth of BellSouth's intent to conduct an audit thirty days hence "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the [FCC's] Supplemental Order." *Letter from Jerry Hendrix to Jake Jennings*, 4/26/02, Exh. B. BellSouth informed NewSouth that it had selected an independent auditor to conduct the audit, and that BellSouth would incur the costs of the audit (unless the auditors found NewSouth's circuits to be non-compliant). *Id.* Simultaneously with the transmittal of this letter to NewSouth, BellSouth forwarded a copy of the letter to the FCC. *Id.*

23. On May 3, 2002, NewSouth responded to BellSouth's request for an audit and stated that "NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the [FCC's] *Supplemental Order Clarification...*" *Letter from Jake Jennings to Jerry Hendrix*, 5/3/02, Exh. D. While NewSouth disputed BellSouth's characterization of NewSouth's obligation to pay for the audit based on a finding of non-compliance, NewSouth agreed to go forward with the audit and address the compensation issue if it arose. *Id.* Moreover, NewSouth indicated that

"NewSouth will provide the BellSouth audit team with only those records that are kept in the normal course of business." *Id.* Finally, Mr. Jennings stated that "in order to facilitate the audit of NewSouth's special access circuits 'converted' to EELs, I have assigned John Fury, Manager of Carrier Relations to act as a single point of contact for the BellSouth audit team... [w]e will contact BellSouth to schedule a pre-audit conference call." *Id.*

24. On May 23, 2002, approximately three weeks after it agreed to the audit, NewSouth wrote again to BellSouth, this time stating that "[b]ased upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations . . ." *Letter from Jake Jennings to Jerry Hendrix*, 5/23/02, Exh. F. In its letter, NewSouth cited the following two reasons as the basis for refusing BellSouth's audit request, assertedly relying on the *Supplemental Clarification Order*: "(1) audits may not be routine and only be conducted under limited circumstances; and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company." *Id.* NewSouth's letter did not discuss or in any way address the terms of the Parties' Agreement, which clearly permitted the requested audit. *Id.*; Agreement, Att. 2, § 4.5.1.5, Exh. A.

25. On June 6, 2002, BellSouth responded to NewSouth's May 23, 2002 letter and stated that BellSouth intended to pursue its audit rights. Although not relevant to BellSouth's audit rights, which arise out of the parties' voluntarily-negotiated Agreement, BellSouth addressed NewSouth's purported reliance on the *Supplemental Order Clarification.* Specifically, BellSouth confirmed that it did not conduct routine audits, and stated that it was only conducting such audits "when it believes such an audit is warranted due to a concern that the local usage options may not be met." BellSouth also pointed out that BellSouth had not conducted any

audits in the two years since the release of the *Supplemental Order Clarification*. Finally, BellSouth explained that its selected auditor was an independent third party, with no affiliation with BellSouth.

26. Some three weeks later, on June 27, 2002, BellSouth sent a follow-up letter to NewSouth stating that as NewSouth had not responded to BellSouth's letter of June 6, 2002, BellSouth "assume[s] that NewSouth is agreeable to proceeding with the audit immediately. ACA's audit team will commence the audit at NewSouth's offices in Greenville on July 15."

27. On June 29, 2002, NewSouth responded to BellSouth's June 27, 2002 letter, once again refusing to submit to the audit. For the next year, the parties exchanged correspondence and verbal communications --- BellSouth trying to exercise its contractual right to an audit, and NewSouth continuing to breach the Agreement by refusing to conduct the audit. *See e.g.* Hendrix Affidavit ¶¶ 6-15, Exh. E.

28. Thus, after over a year of delay, NewSouth remains in breach of the Agreement by refusing to consent to an audit of EEL circuits. Under the clear terms of the Interconnection Agreement, BellSouth is entitled to conduct such an audit.

BellSouth Is Entitled To An Audit Pursuant Either To The Agreement Or the *Supplemental Order Clarification*

29. BellSouth is entitled to conduct an audit of NewSouth's converted EELs under the terms of the Agreement. Section 4.5.1.5 of the Agreement is explicit that BellSouth is entitled to audit the EELs (loop and transport combinations) with 30 days notice and at BellSouth's cost. Agreement, Att. 2, § 4.5.1.5, Exh. A. BellSouth has met both of those criteria. Hendrix Affidavit ¶ 4, Exh. B.

30. In letters to BellSouth, NewSouth has argued that the *Supplemental Order Clarification* supersedes the Agreement and that BellSouth must comply with terms allegedly set forth in the *Supplemental Order Clarification* that are nowhere to be found in the Agreement. *See, e.g., Letter from Jake Jennings to Jerry Hendrix*, 5/23/02, Exh. F. This position is legally flawed. The terms of the Agreement are unambiguous and must be accorded their plain meaning. *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 794 (Ga. 2001) ("whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, *no construction is required or even permissible*, and the contractual language used by the parties must be afforded its literal meaning") (emphasis added).[5]

31. Section 4.5.1.5 of the Agreement governs audits of loop and transport combinations and provides that "BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds nor-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements." Agreement, Att. 2, § 4.5.1.5, Exh. A. The language provides BellSouth an unqualified right to audit NewSouth's circuits provided BellSouth gives 30 days notice and assumes the cost of the audit. *Id.*

32. Section 4.5.1.5 stands in stark contrast with Section 4.5.2.2, which governs audits of Option 4 loop and special access transport combinations. Agreement, Att. 2, § 4.5.2.2, Exh. A.

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[5] *Accord B.L.G. Enterprises, Inc. v. First Financial Ins. Co.,* 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."); *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.,* 199 S.C. 325, 330, 19 S.E.2d 463, 466 (1942)("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

Section 4.5.2.2 provides that "[a]n audit conducted pursuant to this Section ... *shall be subject to the requirements for audits as set forth in the June 2, 2000 Order*, except as expressly modified herein." *Id.* (emphasis added). Section 4.5.1.5, in contrast, does not incorporate the *Supplemental Order Clarification* and instead defines BellSouth's audit rights without reference to anything in that *Order*. Agreement, Att. 2, §§ 4.5.1.5 and 4.5.2.2, Exh. A.

33. Second, the Agreement contains an integration clause. Agreement, GTC, § 29, Exh. A. The integration clause provides that:

> This Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

Agreement, GTC, § 29, Exh. A. Under Georgia law, a merger or integration clause in a contract provides the parties with a substantive, contractual right against a tribunal's use of extraneous material to "construe" the contract in contradiction of its terms. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) (under Georgia law, "a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material").

34. Third, the audit provision was voluntarily negotiated by BellSouth and NewSouth pursuant to Section 252(a)(1) of the Act. Hendrix Affidavit ¶ 3, Exh. E. When parties negotiate and enter into an interconnection agreement voluntarily, they may do so "without regard to the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. § 252(a). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any

implementing FCC rules and orders. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)").

35. The ability of carriers to negotiate an interconnection agreement "without regard to subsections (b) and (c) of Section 251" extends to rules and orders of the FCC - such as the *Supplemental Order Clarification. Iowa Utilities Board v. Commission*, 120 F.3d 753, n. 9 (81h Cir. 1997), aff'd in part, rev 'd in part on other grounds, AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) ("[t]he FCC's rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"). The FCC itself has acknowledged this fact, holding that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing rules we adopt." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

36. Because the Parties voluntarily negotiated an audit provision, BellSouth's right to audit is governed solely by the Agreement. That the terms of the Agreement govern this dispute is clear from various court decisions which have refused to impose obligations under Sections 251(b) and (c) on parties to a voluntarily negotiated interconnection agreement. For example, in *Law Offices of Curtis v. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003), the Second Circuit Court of Appeals considered the extent to

which an end-user customer could bring a claim for alleged violations of Section 251 of the 1996 Act based on conduct that breached the interconnection agreement between the ILEC and the end user's carrier. In dismissing such claims, the Second Circuit noted: "Once the ILEC 'fulfills the duties' enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement." *Id.* Moreover, as the Second Circuit noted in *Trinko*, the fact that parties may negotiate interconnection agreements without regard to Section 251(b) and (c) clearly contemplates that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. *Id.* To read the Act in a way such that ILECs are governed exclusively by the broadly worded language of Section 251 would make superfluous the option of negotiating interconnection agreements without regard to subsections (b) and (c). *Id.* at 322 (citations omitted). The court of appeals refused to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251." *Id.*

37. Similarly, in *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002), the federal district court refused to impose obligations under Section 251(b) and (c) upon an ILEC that had voluntarily negotiated an interconnection agreement. In that case, the plaintiff alleged that Verizon had failed to fulfill its duties under Section 251 by providing poor service, failing to provide pricing information, and intentionally causing a loss of phone service to the plaintiff's customers. In rejecting such claims, the district court noted that Verizon had negotiated with the plaintiff and had agreed upon the terms of interconnection agreements that had been approved by the state commission. According to the court, "upon the approval of the agreements, the duties of each party are

defined by the parameters of their agreement rather than Section 251(b) and (c)." The court held that the plaintiff "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...." *Id.*

38. No dispute exists that the FCC issued its *Supplemental Order Clarification* in connection with the adoption of rules establishing the network elements that an ILEC must unbundle under Section 251(c). *See Supplemental Order Clarification* ¶ 1. But that fact is irrelevant, because the Parties voluntarily negotiated the terms and conditions governing the audit of EELs, as reflected in Section 4.5.1.5 of the Agreement. Hendrix Affidavit ¶¶ 3-4, Exh. E. Because NewSouth and BellSouth were negotiating a voluntary agreement, they were free to agree to terms that were different from the audit requirements in the *Supplemental Order Clarification*, and that is precisely what they did. Agreement, Att. 2, § 4.5.1.5, Exh. A.

39. For example, Section 4.5.1.5 of the Agreement contains no requirement that BellSouth have or articulate a "concern" before conducting an audit. Agreement, Att. 2, § 4.5.1.5, Exh. A; *see, in contrast, Supplemental Order Clarification* ¶ 31, n.86. Further, Section 4.5.1.5 states that BellSouth must pay the cost of any audit regardless of what the audit uncovers (*Id.*), whereas the *Supplemental Order Clarification* states that the competitive LEC must reimburse the ILEC for the cost of the audit "if the audit uncovers non-compliance with the local usage options." *Supplemental Order Clarification* ¶ 31. Allowing NewSouth to now receive the benefits of the *Supplemental Order Clarification* would render superfluous the Parties' ability to negotiate an interconnection agreement "without regard to the standards set forth in" Section 251(c). 47 U.S.C. § 252(a)(1). Furthermore, it would allow NewSouth to "end run" the carefully negotiated audit language in the Parties' Agreement, a result that is at odds with federal law. *Law Offices of Curtis V. Trinko LLP*, 294 F.3d at 322; *Ntegrity*, 2002 U.S. Dist. LEXIS 1471.

40. Fourth, NewSouth's theory that the *Supplemental Order Clarification* somehow "trumps" the Agreement also is inconsistent with the Order itself. In declining to adopt certain auditing guidelines, the FCC noted that many "interconnection agreements already contain audit rights." *Supplemental Order Clarification* ¶ 32. In the words of the FCC: "We do not believe that we should restrict parties from relying on these agreements." *Id.* However, that is precisely what would happen here because, if the Commission were to adopt NewSouth's position, BellSouth would be restricted from relying on the express audit language in the Agreement.

41. In addition to being inconsistent with the text of the Act and with every authority on the issue, adopting NewSouth's position would undermine the entire negotiation and arbitration scheme under the Act. *See* 47 U.S.C. § 252. To the extent NewSouth was interested in having the *Supplemental Order Clarification* govern EELs audits, NewSouth could have negotiated such language into the Agreement, exactly as it did with respect to the provision governing audits of Option 4 circuits. Agreement, Att. 2, § 4.5.2.2, Exh. A. Failing that, it could have sought arbitration on this issue. *See generally* 47 U.S.C. § 252(b). Having elected not to avail itself of these alternatives, NewSouth should not be permitted to achieve the same end indirectly through this litigation.

42. Even if the Commission determines that the *Supplemental Order Clarification* is somehow relevant to this dispute, which it is not, BellSouth has met the alleged criteria set forth in the *Order*. Hendrix Affidavit ¶¶ 16, Exh. E.

43. First, the FCC's passing reference that an audit could be undertaken only when the ILEC "has a concern that the requesting carrier is not meeting the qualifying criteria for providing a significant amount of locale exchange service" is not a "limitation," as NewSouth contends. In paragraph 31 of the *Supplemental Order Clarification*, the FCC was expressing its

Count II: In the Alternative, NewSouth Has Violated The Supplemental Order Clarification and Section 251 of the Act

50. BellSouth incorporates Paragraphs 1 - 52 by reference as if fully set forth herein.

51. Even were the *Supplemental Order Clarification* for some reason deemed applicable to this case, which BellSouth contends it is not, BellSouth has met the requirements set forth in the *Supplemental Order Clarification* to conduct an audit. BellSouth gave 30 days' written notice of its intention to conduct the audit, selected an independent auditor, and agreed to pay the entire cost of the audit. Further, although not a requirement of the *Supplemental Order Clarification*, BellSouth has articulated concerns in support of its audit request. Because BellSouth has met all of the requirements of the *Supplemental Order Clarification*, NewSouth has violated the *Supplemental Order Clarification* and Section 251 of the Act by refusing to allow BellSouth to conduct an audit of NewSouth's EELs.

52. As a direct and proximate result of NewSouth's violation, BellSouth has been harmed by its inability to verify NewSouth's compliance or non-compliance with the Agreement and the requirements of the *Supplemental Order Clarification.* Agreement, Att. 2, § 4.5.1.5, Exh. A.

PRAYER FOR RELIEF

53. Wherefore, for the reasons stated above, BellSouth respectfully requests that the Commission issue an Order;

54. Finding and concluding that NewSouth has breached its obligations under the Interconnection Agreement by refusing to allow BellSouth to conduct an audit of NewSouth's EEL circuits;

55. In the alternative, and only if deemed necessary by the Commission, finding and concluding that NewSouth has violated the terms of the *Supplemental Order Clarification* and Section 251 of the Act by refusing to allow BellSouth to conduct an audit of NewSouth's EEL circuits, despite BellSouth having complied with the requirements set forth in the *Supplemental Order Clarification*;

56. Compelling NewSouth to allow BellSouth's auditor to conduct the audit, within 30 days of the Commission's order in this matter, of NewSouth's EELs;

57. Granting such other and further relief as the Commission deems just and proper.

BELLSOUTH'S LEGAL ANALYSIS IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

The Commission should grant BellSouth's Motion for Summary Disposition and rule in BellSouth's favor because BellSouth is clearly entitled to conduct an audit of NewSouth's EEL combinations pursuant to the terms of the Parties' voluntarily negotiated Interconnection Agreement ("Agreement"). The Agreement provides BellSouth with an unqualified right to audit NewSouth's EEL combinations upon thirty days' notice and at BellSouth's expense. BellSouth has satisfied these requirements. NewSouth's refusal to conduct such an audit violates the Agreement.

BellSouth's Right to Audit Is Governed by the Terms of the Parties' Voluntarily Negotiated Agreement

The audit provisions of the Agreement govern BellSouth's right to audit NewSouth's EEL combinations to verify the amount of local exchange traffic on the circuit. It is a fundamental principle under the Telecommunications Act of 1996 that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b)

and (c) of section 251." 47 U.S.C. § 252(a)(1). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing FCC rules. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)"). The FCC itself has acknowledged that "parties that voluntarily negotiate agreements need not comply with the requirements [it] establishes] under Sections 251(b) and (c), including any pricing rules [it] adopt[s]." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Red 15499, 15527-28 ¶ 54 (1996).

This is precisely what BellSouth and NewSouth accomplished by entering into the Agreement. Having entered into a binding interconnection agreement whose provisions do not mirror the substantive obligations imposed by the statute and implementing rules and orders, neither party may "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251." *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003); *see also Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, "the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)" and that a party "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts"). Yet

this is precisely what NewSouth has done by repeatedly denying BellSouth's numerous requests for an audit.

Although BellSouth has complied with all of the requirements of the *Supplemental Order Clarification* as they pertain to EELs audits, the Parties chose not to incorporate those requirements into the Agreement as it relates to audits of EEL combinations, whether new or combinations converted from special access. The terms of the Agreement regarding such audits are clear and unambiguous: BellSouth may conduct such an audit "at its sole expense, and upon thirty (30) days notice to NewSouth." *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. When, as in this case, the terms of an agreement are clear and unambiguous, construction is "unnecessary," and the agreement must be enforced "according to its clear terms."[6] *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 567 S.E.2d 697, 699 (Ct. App. Ga. 2002); *see also Neely Dev. Corp. v. Service First Investments, Inc*, 582 S.E.2d 200, 202 (Ct. App. Ga. 2003) ("Where ... the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.") (internal quotations omitted); *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 784 (Ga. 2001) ("whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning").[7]

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[6] Pursuant to the Agreement's governing law provision, Georgia law controls the construction and enforcement of the Agreement. *See* Agreement, Att. 2, § 18, Exh. A.

[7] South Carolina law on this subject is substantially similar to the controlling Georgia law cited above. *See, e.g., B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."); *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 330, 19 S.E.2d 463, 466 (1942)("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

The integration clause in the Agreement, *see* Agreement, GTC, § 29, Exh. A, also precludes reading the audit provisions to incorporate extraneous terms. Under Georgia law, a merger or integration clause in a contract provides the parties with a substantive right not to have extraneous material used to "construe" the contract in contradiction of its express terms. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) (under Georgia law, "a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material"); *see also McBride v. Life Ins. Co. of Virginia*, 190 F. Supp.2d 1366, 1376 (M.D. Ga. 2002) ("As a matter of general contract construction, a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material."); *GE Life and Annuity Assurance Co. v. Combs*, 191 F. Supp.2d 1364, 1373 (M.D. Ga. 2002) (same).[8]

To the extent NewSouth was interested in having the *Supplemental Order Clarification* govern loop and transport combinations audits, NewSouth could have sought to negotiate such language into the Agreement, exactly as it did with respect to the provision governing audits of Option 4 circuits. *See* Agreement, Att. 2, § 4.5.2.2, Exh. A (incorporating "the requirements for audits as set forth in the June 2, 2000 Order" with respect to audits of EELs converted pursuant to Option 4). Failing that, it could have sought arbitration on this issue. *See generally* 47 U.S.C.

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[8] South Carolina law on this subject is substantially similar to this controlling Georgia law. *See, e.g. Iseman v. Hobbs,* 290 S.C. 482, 483, 351 S.E.2d 351, 352 (Ct.App.1986) ("When a written agreement is clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to the execution of a written instrument may not be used to contradict, explain, or vary the terms of the written instrument."); *accord Wilson v. Landstrom,* 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984) (completely integrated agreement); *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct.App. 2003) (defining a merger clause as "[a] provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.")(citing *Black's Law Dictionary* 989 (6th ed.1990)).

§ 252(b). Having elected not to avail itself of these alternatives, NewSouth should not be permitted to achieve the same end indirectly through this litigation. BellSouth's right to audit NewSouth's EEL combinations is governed by the clear and unambiguous terms of the Agreement.

BellSouth has satisfied all prerequisites for conducting an audit pursuant to section 4.5.1.5 of the Agreement. Section 4.5.1.5 provides as follows:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on the audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A.

BellSouth has satisfied all that section 4.5.1.5 requires to conduct an audit. BellSouth sent NewSouth a letter informing NewSouth that it had selected an independent auditor and intended to commence an audit, at BellSouth's expense, thirty days hence "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." *See Letter from Jerry Hendrix to Jake Jennings*, 4/26/02, Exh. B. Although NewSouth initially consented to an audit, *see Letter from Jake Jennings to Jerry Hendrix*, 5/3/02. Exh. D, NewSouth later revoked its consent and since that time has repeatedly refused to permit an audit despite BellSouth's satisfaction of the Agreement's audit requirements. *See e.g., Letter from Jake Jennings to Jerry Hendrix*, 5/23/02, Exh. F.

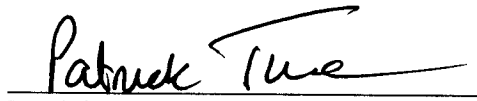
For the above reasons, the Commission should (1) grant BellSouth's request for summary disposition of this case; (2) find that the Agreement governs BellSouth's right to audit; (3) find that BellSouth is entitled to an immediate audit of NewSouth's EEL combinations under the terms of the Agreement; and (4) find that NewSouth's refusal to permit the audit violated the Agreement.

CONCLUSION

For all of the reasons set forth herein, BellSouth respectfully requests that the Commission issue (1) a determination that NewSouth's refusal to allow BellSouth to audit its EEL combinations violates the Parties' Agreement; (2) to the extent relevant to the Commission's consideration of this matter, a determination that NewSouth's refusal to submit to an audit violates the FCC's *Supplemental Order Clarification*; and (3) an order directing NewSouth to do all things reasonably necessary to permit the independent auditor selected by BellSouth to commence the audit immediately.

This 5th day of March, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



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